

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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FREEPLAY MUSIC, LLC,

Plaintiff,

ATTORNEY DECLARATION

v.

Civil Action No.: 1:18-cv-10980-ER

RIGOL TECHNOLOGIES USA, INC. and
RIGOL TECHNOLOGIES, INC.

Defendants.

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SETH L. BERMAN, ESQ., hereby declares:

1. This firm, Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara, Wolf & Carone, LLP is counsel of record for the Plaintiff, FREEPLAY MUSIC, LLC (“FPM”).

2. I make this declaration (the “Berman Declaration”) in support of FPM’s Motion for Partial Summary Judgment on Liability against Defendant RIGOL Technologies USA, Inc. (“RIGOL”), a subsidiary of RIGOL Technologies, Inc. (“RIGOL China”), pursuant to Federal Rules of Civil Procedure 56.

3. This declaration is based upon my personal knowledge obtained as attorney for FPM, as well as the exhibits and Memorandum of Law submitted in support of FPM’s Motion for Partial Summary Judgment on Liability.

4. As set forth in detail below, and in the accompanying Memorandum of Law, Defendant unlawfully infringed five (5) copyrighted songs owned by FPM by using them as the soundtrack for at least one hundred and seventy (170) English language product advertisements for electronic testing equipment directed towards customers in New York State (“N.Y.”) and

elsewhere in the U.S., without permission from FPM and in violation of the U.S. Copyright Act (the “Copyright Act”).

5. Defendant has no substantive defense to this matter and admitted to their direct involvement in the unlicensed creation and use of the infringing videos in multiple submissions to the Court, in violation of FPM’s rights under 17 U.S.C. § 106.

6. Such unlawful and unlicensed violation of FPM’s rights combined with FPM’s proof of copyright ownership as shown by the copyright registration certificates attached to the Complaint (ECF No. 1-1, 1-2, 1-3, 1-4, and 1-5) satisfies the two-part test in order for FPM to successfully make out a *prima facie* showing of copyright infringement.

7. Furthermore, since copyright infringement is a strict liability statute, RIGOL’s admission of guilt leaves no genuine issue of material fact with regards to RIGOL’s liability for copyright infringement.

8. Accordingly, for the reasons set forth herein, together with the accompanying Memorandum of Law and Declaration of Scott Schreer, FPM’s Motion for Partial Summary Judgment on Liability should be granted.

FACTS & EXHIBITS

9. For the sake of brevity and judicial economy, the undersigned restates the Statement of Facts set forth in FPM’s accompanying Memorandum of Law and incorporates them as if fully set forth herein.

10. Attached hereto as Exhibits are true and correct copies of the documents referenced in the Memorandum of Law submitted herewith.

11. Attached hereto as **Exhibit “A”** are copies of Defendants’ videos containing unauthorized uses of FPM’s copyrighted songs.

12. Attached hereto as **Exhibit “B”** is a copy of email correspondence from January 6, 2017 to July 27, 2017 between FPM’s copyright administrator, TuneSat, LLC, on behalf of FPM, with RIGOL employees Chris Armstrong, Michael Rizzo, and Edward Pan, as well as the unidentified “RIGOL Support” email address, in which:

- a. RIGOL is informed of 170 unlicensed uses of FPM’s copyrighted songs and the URLs associated with each use;
- b. Rizzo admits that RIGOL China was “in charge of video content” and created the video advertisements and promotions containing unauthorized uses of FPM’s copyrighted songs;
- c. the removal and subsequent reposting of videos containing infringing uses is discussed;
- d. the parties discuss the purchase of a retroactive license; and
- e. Rizzo avers that RIGOL considers taking down the videos to constitute resolution of the action.

13. Attached hereto as **Exhibit “C”** is a copy of the Summons and Complaint and Jury Demand with attached exhibits filed on or about November 21, 2018 (ECF No. 1 and Exhibits 1-1 through 1-5).

14. Attached hereto as **Exhibit “D”** is a copy of Defendant RIGOL’s Answer and Affirmative Defenses to FPM’s Complaint, filed on or about January 18, 2019 (ECF No. 16).

15. Attached hereto as **Exhibit “E”** is a copy of Co-Defendant RIGOL China’s Memorandum of Law in support of its motion to dismiss FPM’s Complaint for lack of proper service and personal jurisdiction, filed on or about April 12, 2019 (ECF No. 24-1).

16. Attached hereto as **Exhibit “F”** is a copy of RIGOL China’s Reply Memorandum of Law to FPM’s Opposition to RIGOL China’s motion to dismiss, filed on or about May 28, 2019 (ECF No. 26).

17. Attached hereto as **Exhibit “G”** is a copy of the relevant provisions of FPM’s website Term of Use in effect on or about the date of RIGOL’s first uploads, March 2013.

18. Attached hereto as **Exhibit “H”** is a list identifying the works infringed, the videos each one was used in, and the URL of each video.

WHEREFORE, your deponent respectfully requests that this Honorable Court grant Plaintiff FPM’s Motion for Partial Summary Judgment on Liability against Defendant RIGOL in its entirety together with such other and further relief as this Court deems just and proper.

I declare under penalty of perjury that the foregoing is true and correct. Executed on the 7th day of May 2020.


SETH L. BERMAN, ESQ.